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In the
Supreme Court of the United States

October Term, 1982

Charles Tillman ..... *Petitioner*

V.

State of Arkansas ..... *Respondent*

WRIT FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

WILLIAM C. McARTHUR
2020 Broadway
P. O. Box 589
Little Rock, Arkansas
(501) 376-6173

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

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THE DECISION BELOW ALLOWS A CLEAR VIOLATION OF FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IS CONTRARY TO THIS COURT'S RULING IN *ROBBINS V. CALIFORNIA*, ___ U.S. ___, 101 S.Ct. 2841 (1981).

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OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at Ark. (Mar. 8, 1982) and is attached as Appendix "B". The denial of the Petition for Rehearing, issued April 12, 1982, is attached as Appendix "D".

JURISDICTION

The opinion of the Arkansas Supreme Court was filed on March 8, 1982. The Petition for Rehearing was denied by that Court on April 12, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution Fourth Amendment:

(Unreasonable searches and seizures.)—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Ark. Stat. Ann. 43-429:

43-429: Stopping and detaining person reasonable suspected of committing or about to commit a felony—Time Limit.—(a) Law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person whom he reasonably suspects is committing, has committed, or is about to commit a felony, if such action is reasonably necessary to identify or determine the lawfulness of such person's conduct. An officer acting under this section may require that person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes, at the end of such period the person detained shall be released without further restraint, or arrested and charged with a crime.

(b) As promptly as is reasonable under the circumstances, a law enforcement officer who has detained a person under this section shall advise that person of his official identity and inform such person of the reason for the detention, (Acts 1969, No. 378, 1, p. 1086)

STATEMENT OF THE CASE

Deputy Alan Swint of the Lonoke County Sheriff's Department was in the England, Arkansas Police Department on February 4, 1980, at approximately 12:30 p.m. when an unknown person entered the police department and told him that he had been following a bronze Cadillac with three black males in the vehicle from North Little Rock to the vicinity of Scott, Arkansas. He told the Deputy that the car would slow down at certain houses and then continue on. On the basis of this information, Deputy Swint proceeded to the Scott area and upon reaching the intersection of Highway 130 and Walkers Corner Road, he observed the Cadillac automobile in the roadway facing south. The automobile proceeded to the stop sign at Highway 130 and turned toward North Little Rock. The Deputy followed the automobile into Pulaski County and almost into the North Litle Rock City limits. At that point he stopped the vehicle by use of the lights on his police unit and stopped a Pulaski County Sheriff's car at the same time. The Deputy then arrested and took into custody all three occupants of the vehicle. Petitioner being one, and placed in the police unit. After the three occupants were arrested Deputy Swint received a police communication that the George Brown home on Walker Corner Road had been burglarized. He then opened the trunk of the automobile and observed some folding clothing bags in the trunk of the vehicle. The prisoners and the automobile were then transported to the Lonoke County Sheriff's Department where the items were seized from the trunk of the vehicle and the Appellants were officially charged with burglary and theft. Petitioner moved to suppress the evidence seized and a hearing was conducted, by the Lonoke Circuit Court and the Motion was denied. On August 19, 1980, Petitioner was tried by a jury in Lonoke Circuit Court, found guilty and sentenced on both the burglary and the theft charges.

Following conviction of Petitioner, his case was appealed to the Arkansas Supreme Court and on March 8, 1982, an opinion was delivered affirming by four to three vote the rulings of the lower court. A Petition for Rehearing was filed on March 24, 1982 and on April 12, 1982, the Court denied the rehearing again by four to three vote.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW ALLOWS A CLEAR VIOLATION OF FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IS CONTRARY TO THIS COURT'S RULING IN *ROBBINS V. CALIFORNIA*, ___ U.S. ___, 101 S.Ct. 2841 (1981).

It must be determined whether the detention of the three men constituted an arrest or merely an investigatory stop and the legality of either.

If the detention was an arrest then probable cause would be necessary in order for the arrest to be legal. Probable cause for an arrest means there must be a substantial probability that a crime has been committed and that the person to be arrested committed it. Petitioner contends the detention was an arrest and probable cause was not sufficient making the arrest an illegal one. The legal issue of probable cause necessary for arrest without a warrant must be resolved on a case-by-case basis from individual facts and circumstances. *Harris v. Stephens* 361 F.2d 888 (1966).

In *McDonald v. State*, 491 S.W.2d 253, Ark. 812 (1973) the Supreme Court of Arkansas stated, "Counsel is mistaken in arguing that there was no arrest simply because the officers did not use the word "arrest" before making the search. It is the actual restraint, or consent to restraint, that constitutes an "arrest"! In this particular case, the three men were being restrained and they felt compelled to move in accordance with the arrestor's instructions. In other words they felt their freedom of movement had been taken away. Also, in the arresting officer's testimony he concedes that the men were arrested. (See dissenting opinion, page 2).

Since this appears to be an arrest, according to the law and of the officer's testimony, Appellant contends probable cause was not sufficient to make the arrest. At the time of the detention the arresting officer did not have any knowledge that a crime had been committed and at that time did not have probable cause to make the arrest.

The majority opinion denies that this was an arrest but maintains it was only an investigatory stop. Reasonable suspicion is required for an investigatory stop to be made. This is a slightly lesser standard than probable cause. However, this type of stop is limited and does have restrictions. The Supreme Court of the United States has recognized this type of stop in four situations. In *Terry v. Ohio*, 392 U.S. 1 (1968), and *Adams v. Williams*, 407 U.S. 143 (1972), the search was limited to the person's clothing and the area within their immediate control and this was only to protect the officer from any harm that might come to him if weapons were hidden. In *United States v. Brignon-Ponce*, 422 U.S. 873 (1975), special circumstances existed for border searches and stops.

Finally, in *United States v. Cortez*, 499 U.S. 411 (1981) the court said it was necessary for there to be an objective manifestation that the person is, or is about to be, engaged in criminal activity, the detention and investigation may not be based on a peace officer's unsupported intuition, subjective feelings or suspicion, mere hunch, or good faith but it must be based on the objective perception of events, without particularization as to a specific crime. "The analysis of that objective manifestation may include articulation of objective observations, information from police reports or consideration of modes or patterns of operation of criminals. (See dissention opinion – page 4). *United States v. Cortez. supra.*

In this particular case, the Deputy had information from an unknown and unidentifiable informant. In *Auguilar v. Texas*, 378 U.S. 108 (1964), underlying circumstances

necessary to judge the validity of an informant's conclusion were necessary and the informant must be shown to be credible and his information reliable. There is some question in this case whether either one of these requirements was satisfied regarding the informant. The Deputy had knowledge of prior burglaries, but no testimony was introduced to demonstrate the modes or patterns of those burglaries. The deputy did not know appellants or their backgrounds. "The specificity in the information is the touchstone on which a legitimate investigatory stop is made." *United States v. Cortez, supra*, in the instant case, it appears the officer did not articulate a reasonable suspicion for the stop and it was therefore unlawful.

Since, whether classified as an arrest or an investigatory stop, the detention was unlawful, the evidence seized as a result is tainted and should be excluded. *Wong Son v. United States*, 371 U.S. 471 (1963).

If the evidence cannot be suppressed for the preceding reason, then, if allowed it must fit into an exception to the general rule which says the seizure of evidence without a warrant is, per se, unreasonable. *Katz v. United States*, 389 U.S. 347 (1967).

In this case the seizure cannot be classified as one incident to an arrest because the deputy testified that the car was not searched until sometime later. "Once an accused is under arrest and in custody, then a search made at another place without a warrant is simply not incident to arrest" *Cambers v. Maroney*, 399 U.S. 42 (1970) quoted in *Jenkins v. State*, 253 Ark. 249, 485 S.W.2d 541 (1972).

This particular search and seizure cannot be classified as a protective search because it was not a frisk for the officer's protection. The search cannot be classified as a "plain view" exception because the inside of the trunk would not be considered in plain view.

New York v. Belton, ___ U.S. ___ 101 S.Ct. 2860 (1981) allows for a search of the passenger compartment of a vehicle when a lawful custodial arrest has been made. This case is not applicable however, because it does not address any area other than the passenger compartment and no mention of the trunk is made. However, in *Robbins v. California*, ___ U.S. ___, S.Ct., 2841 (1981), officers uncovered a recessed luggage compartment in a station wagon and found two plastic garbage bags containing 30 pounds of marijuana. The Supreme Court of the United States *rejected* the contention that the "automobile exception" to the Fourth Amendment warrant requirement justified the warrantless search of closed containers found inside the automobile and held the contents of a closed container is such that its contents are in plain view.

In this particular case, there is some question about whether the contents were in plain view. The deputy testified he saw the silver but the photograph does not show any of the contents of the luggage. The case does involve closed containers found in a recessed compartment (trunk) and thus, if *Robbins* is followed, would be protected by the Fourth amendment warrant requirement and the evidence should be excluded because a warrant was not obtained. The majority opinion argues the 1925 "Automobile exception" case of *Carroll v. United States*, 267 U.S. 132 (1925). That case allows a warrantless search where the vehicle can be quickly moved out of the locality, but in this case the car was in custody and could not be moved.

Arkansas cases which are directly in point hold that a warrantless search of a vehicle is invalid unless there is *both* a probable cause and exitent circumstances. The United States Supreme Court has allowed warrantless searches on probable cause alone and the majority opinion argues that when the officer learned of the burglary he then had probable cause to believe the vehicle contained evidence of the crime and the search was legal. However, if you follow Arkansas case law, exigent circumstances must

also exist for a search without a warrant. *Jenkins v. State, supra; Stell v. State*, 248 Ark. 159, 450 S.W.2d 545 (1970). Arkansas cases directly in point should govern even if the standard is more stringent. *Meadows v. State*, 269 Ark. 380, 602 S.W.2d 636 (1980). In this case, no exigent circumstances existed because the three men were in custody and the car was impounded. There was no immediate danger to the officers and no possibility of any evidence being destroyed. The officers had time to get a warrant after transporting the car to the Sheriff's compound and should have done so. Because the search did not fit into any of the exceptions to the general rule, the evidence should have been suppressed because a warrant was not obtained.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully submits that the Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM C. McARTHUR
2020 Broadway
P. O. Box 589
Little Rock, AR 72201
(501) 376-6173

Attorney for Petitioner